UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

GRAY, ET AL.	C.A. No. 04-312L C.A. No. 03-148L C.A. No. 03-335L
V.	C.A. No. 04-026L C.A. No. 04-056L C.A. No. 03-483L
DERDERIAN, ET AL.	

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS', DENIS LAROCQUE, ANTHONY BETTENCOURT AND MALCOLM MOORE IN HIS CAPACITY AS FINANCE DIRECTOR FOR THE TOWN OF WEST WARWICK'S MOTION TO DISMISS IN LIEU OF ANSWER

I. INTRODUCTION

Defendants, Denis Larocque, Anthony Bettencourt, and Malcolm Moore in his capacity as Finance Director for the Town of West Warwick (hereinafter "Town defendants") hereby file the instant Reply Memorandum to Plaintiffs' Objection to the Town defendants' Motion to Dismiss the above captioned matter pursuant to Rule 12(b)(6). Essentially plaintiffs are seeking to maintain a claim against these defendants for a third-party's failure to comply with the law. Not only does the Amended Master Complaint on its face fail to state a cause of action under Rhode Island law, but these defendants are nevertheless immune from suit under the statutory provisions, quasi-judicial immunity and the public duty doctrine. The facts viewed in the light most favorable to plaintiffs also fail to support a finding that the alleged negligent acts were the proximate cause of plaintiffs' injuries. Defendants thus respectfully submit that the instant Amended Master Complaint should be dismissed.

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II. ARGUMENT

A. R.I.G.L. § 23-28.2-17 grants the Deputy Fire Inspector Immunity

In opposition to the claim of immunity afforded Defendant Larocque pursuant to *§ 23-28.2-17,* plaintiffs allege that defendant Larocque is not entitled this protection because his inspections were not conducted in good faith.[1] It is first noteworthy that § 23-28.2-17 specifically provides that a fire marshal acting in "good faith *and* without malice" is free from liability. Thus, as reiterated by the R.I. Supreme Court, a deputy fire marshal can only be held "personally liable for official acts while acting in bad faith and with malice." *Vaill v. Franklin, 722 A.2d 793, 795 (R.I. 1999)(emphasis added) quoting LeFranc v. Amica Mutual Insurance Co., 594 A.2d 382, 384 (R.I. 1991).* Accordingly, under the statute, in order to defeat the deputy fire marshal's immunity, plaintiff must demonstrate both that the official acted in bad faith *and* with malice. In the instant case, plaintiffs, by a conclusory allegation, merely claim that defendant Larocque did not act in good faith when he inspected the premises. Plaintiffs do not allege that defendant Larocque was malicious in his inspection of the Station nightclub.[2] Thus, defendant Larocque is entitled to the immunity afforded by *§ 23-28.2-17* and the Amended Complaint should be dismissed.[3]

In addition, even if a lack of good faith, without a claim of malice, was sufficient to deny defendant Larocque protection under *§ 23-28.2-17*, the Amended Master Complaint, even when read in the light most favorable to plaintiffs, does not support a finding of lack of good faith on

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[1] In Plaintiffs' original Complaint, under which the instant Motion to Dismiss was originally filed, plaintiffs did not allege a lack of good faith on the part of defendant Larocque. However, in their Amended Complaint they add the claim that defendant Larocque's actions were not in good faith.

[2] In fact, the factual predicate in support of plaintiffs' claims against these defendants do not support an allegation that defendant Larocque acted with malice. As more fully outlined *infra,* the factual allegations do not even support the conclusory allegation that he acted without good faith.

[3] Plaintiffs maintain that granting defendant Larocque immunity under *§ 23-28.2-17* does not relieve the Town of liability in the instant case. However, as plaintiffs do not contest the fact that defendant Larocque was acting under the authority granted him as a deputy fire marshal by *§ 23-28.2-1 et seq.*, such authority clearly flows from his position as a State appointed deputy fire marshal rather than through his employment by the Town of West Warwick. Consequently, the Town cannot be held liable for the actions of defendant Larocque performed in his capacity as deputy fire marshal.

the part of defendant Larocque. As the Court is aware, when addressing a Motion to Dismiss in lieu of Answer, the Court does not need to give credit to "bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, [and] outright vituperation." *Puertorriquenos En Accion v. Herenandez, 367 F.3d 61, 68 (1st Cir. 2004); Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997).* The crux of the factual allegations against defendant Larocque in the Amended Complaint sound in pure negligence. The Amended Complaint specifically alleges that defendant Larocque failed to adequately inspect the Station, failed to enforce fire safety laws, etc. These allegations do not support a claim of lack of good faith. Defendants thus submit that plaintiffs cannot rely on the "bald assertion" that Defendant Larocque lacked good faith in the face of an Amended Master Complaint that clearly alleges simple negligent actions to overcome the instant Motion to Dismiss. To allow otherwise would give no meaning to the immunity afforded by *§ 23-28.2-17.*

Plaintiffs also seek to rely on *Vaill v. Franklin, 722 A.2d 793 (R.I. 1999)* for the position that the Court must determine if the inspection was "reasonable" before determining if defendant Larocque is entitled to*§ 23-28.2-1's* protection. Plaintiffs' reliance on *Vaill*, however, is misplaced. In *Vaill*, the Court was addressing a *§ 1983* claim for unreasonable search and seizure. Thus, the Court was analyzing whether the defendant Chief was entitled to qualified immunity from the civil rights action. Such a determination, of course, hinges upon whether the search was reasonable. Defendants thus respectfully submit that the instant Amended Master Complaint should be dismissed pursuant to *§ 23-28.2-17.*

B. Quasi Judicial Immunity

Defendants alternatively submit that defendant Larocque is entitled to quasi-judicial immunity. In opposition, plaintiffs argue that Defendant Larocque is not entitled to quasi-judicial immunity because under the statute he has no discretion in determining what situations

amount to a violation of the Fire Safety Code. Plaintiffs specifically identify particular standards that must be met in order to be in compliance with the Fire Safety Code. However, such an argument can be made against any judicial act. All judges and quasi-judicial officers are afforded guidance as to what activities amount to a violation of the applicable law. The fact that the Fire Safety Code specifically outlines the standards to be imposed does not negate the role played by the deputy fire marshal in determining if the Code has been violated and thus deserving of prosecutorial action.

Moreover, there can be no dispute that under the statute, the fire marshal (and by designation deputy fire marshal) not only exercises his discretion and judgment in determining if a particular set of facts amounts to a violation of the Code but he/she must also exercise discretion and judgment as to the proper manner of enforcement and compliance with the statute. Under *§ 23-28.1-7*, the fire marshal has the authority to provide "reasonable notice of fire safety code violations and establish a timetable for compliance." In addition, the fire marshal is left with the discretion (upon approval by the Chairperson of the Board of Appeal) to determine if a violation requires immediate abatement because it presents an immediate danger to life. *Id.* These duties clearly fall within the discretion and judgment of the fire marshal that is akin to a judicial act. Consequently, the deputy fire marshal is entitled to quasi-judicial immunity.

C. The Public Duty Doctrine Protects the Town Defendants from the Instant Suit

1. "Proprietary" vs. "Governmental" Distinction has no bearing on whether governmental official may be held liable

In opposition to defendants' Motion to Dismiss based on the public duty doctrine, plaintiffs allege that the first question in all public duty doctrine cases is whether the activity of the official is "governmental or proprietary." Plaintiffs then argue that defendant Bettencourt, as a detailed police officer assigned to the Station nightclub, was engaged in a proprietary function and thus subject to unlimited liability. The first problem with plaintiffs' argument is the fact that

the R.I Supreme Court has expressly rejected the "Byzantine distinction" between governmental and proprietary functions in determining the liability of governmental entities. *O'Brien v. State, 555 A.2d 334, 338 (R.I., 1989).* As explained by the Supreme Court:

> the former distinction between proprietary and governmental functions no longer is either controlling or of significant assistance in determining the liability of a municipality or the state under our current Tort Claims Act. When we analyze whether an activity would be performed by a private person so as to bring it within the provisions of § 9-31-1, our analysis is functional rather than abstract. We inquire whether this is an activity that a private person or corporation would be likely to carry out. If the answer is affirmative, then liability will attach. Although this analysis may bear some analogy to the governmental-function test, it is far simpler and less complex in implementation.[4] *Id.*

Thus, under well-settled case law, the first step in all public duty cases is whether the governmental official is engaged in an activity that a private person or corporation would be likely to carry out. *DeLong v. Prudential Property & Casualty Ins. Co., 583 A.2d 75, 76 (R.I., 1990).* Contrary to plaintiffs' assertions, the activities of Officer Bettencourt, that is the enforcement of the criminal laws, is an activity not normally performed by a private individual.[5] *See generally DeLong, 583 A.2d at 76 (the duty imposed upon police officers to enforce the criminal laws was public in nature); Barratt v. Burlingham, 412 A.2d 1219, 1221 (R.I. 1985); Kelly v. Cook, 41 A. 571, 572, 21 R.I. 29, ___, (R.I. 1898). Cf. Martinelli v. Hopkins, 787 A.2d 1158 1167 n.6 (R.I., 2001) citing State v. Botelho, 459 A.2d 947, 949 (R.I. 1983) (casting doubt on whether police officers assigned to a detail at a license concert event were engaged "in anything other than a governmental function").*[6]

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[4] Plaintiffs appear to confuse the determination of whether the statutory cap on damages applies to whether a municipality may in the first instance be held liable. While the General Assembly has retained the proprietary vs. governmental distinction in determining whether the cap on damages applies, *R.I.G.L. § 9-31-3*, it is "not helpful in determining whether the state would be liable for performing an act for which a private person would be responsible." *DeLong v. Prudential Property & Casualty Ins. Co., 583 A.2d 75, 76 (R.I., 1990).*

[5] Plaintiffs do not attempt to argue that the deputy Fire Marshal's inspection of the nightclub was an activity normally performed by a private individual. Thus, there is no dispute that the public duty doctrine applies to defendant Larocque's actions.

[6] Because of a stipulation by the plaintiff in Martinelli, the Supreme Court did not need to expressly address this issue.

Plaintiffs' reliance on *The Housing Authority of the City of Providence v. Oropeza, 713 A.2d 1262, 1264 (R.I. 1998)* fails first and foremost because of the fact that in *Housing Authority*, the Court was addressing whether the government was engaged in a "proprietary or governmental function" not whether the activity was one normally performed by a private individual. In particular, in the *per curiam* decision, the Court addressed whether prejudgment interest should attach to a judgment against the City's Housing Authority. This determination hinged upon whether the government was engaged in a proprietary or governmental function. The Court in *Housing Authority* thus concluded that providing security in its own building by the Housing Authority was proprietary in nature. In the instant case, the proper analysis is whether the challenged activity is one normally undertaken by private individuals.

Housing Authority also fails to support plaintiffs' claims because the challenged action in that case did not involve the activities of a police officer who is otherwise charged with enforcing the criminal laws. Rather, the Supreme Court was addressing whether prejudgment interest should attach to a claim against the Housing Authority that had purportedly instituted security measures in one of its own buildings. Similar to the private security afforded in certain apartment or other commercial buildings, the providing of security in its own building was deemed to be a proprietary function. Such an activity can not be analogized to a uniformed police officer assigned to work a detail.

Consequently, defendants respectfully submit that the activities of defendant Bettencourt, that is enforcement of criminal laws, is not normally performed by private individuals and thus the public duty doctrine operates to protect defendant Bettencourt from the instant action.

2. Egregious Conduct

Plaintiffs further allege that the defendants cannot claim protection under the public duty doctrine because the defendants' actions were "egregious." As noted in defendants'

Memorandum in Support of their Motion to Dismiss, in order to demonstrate egregious conduct plaintiffs must prove that the governmental official "has knowledge that it has created a circumstance that forces an individual into a position of peril and subsequently chooses not to remedy the situation." *Houle v. Galloway School Lines, Inc., 643 A.2d 822, 826 (R.I.1994).* Plaintiffs allege that defendant Larocque "created" the perilous circumstances by failing to identify known violations, failing to ensure that known violations were remedied and by an alleged subsequent decision to increase the capacity of the Station. *Plaintiffs' Memorandum, at 23.* Quite simply, such allegations are not enough to demonstrate the "creation" of a perilous circumstance. To find otherwise, would automatically subject all inspectors who fail to discover violations of either the Fire Safety Code, the building code or otherwise to liability. The public duty doctrine would have no meaning if the "egregious conduct" exception were overcome by merely demonstrating a failure on the part of the inspector to identify violations.

The cases cited by plaintiffs in support of this position, *Verity v. Danti, 585 A.2d 65 (R.I. 1991)* and *Bierman v. Shookster, 590 A.2d 402 (R.I. 1991)*, further offer no support for a finding of egregious conduct. As more fully argued in the State of Rhode Island and Irving Owens' Reply Memorandum (hereinafter "State's Reply Memorandum"), in all but one of the cases relied on by the plaintiffs, the activity challenged involved the State's conduct on its *own* property. *State's Reply Memorandum, at 4.* Plaintiffs can not cite to a case involving egregious conduct based upon the government's failure to force a third party to comply with the law.

In addition, the only other case relied upon by plaintiffs, *Martinelli v. Hopkins, 787 A.2d 11158, 1169 (R.I. 2001)* offers no support for plaintiffs' claim of egregious conduct. In the first instance, as further outlined in the State's Reply Memorandum, *Martinelli* involved an "extraordinary event" which the Court had not seen before nor since its decision. *State's Reply Memorandum, at 4-5.* The concert at the Station nightclub did not involve such an

"extraordinary event." Moreover, the allegations against the Town defendants in *Martinelli* involved a total failure on the part of the Town to inspect or supervise the event or even question the licensee as to his intended attendance and beer consumption. *Id.* Despite such a lack of information or oversight, the Town proceeded to license an event it knew, because of its long history, posed several safety issues. In the instant case, plaintiffs can only cite to the failure of the deputy fire marshal to identify violations and ensure that violations were corrected. Quite simply, plaintiffs are relying on the failure of the Town to ensure that third parties comply with the law. Clearly such activity does not amount to the creation of a perilous circumstance sufficient to amount to egregious conduct under the public duty doctrine. The public duty doctrine thus protects these defendants from the instant action.

3. Special Duty

Plaintiffs also claim to avoid the public duty doctrine because they were entitled to a "special duty" by virtue of defendant Larocque's three inspections of the site and defendant Bettencourt's presence at the scene on the night of the fire. There is clearly no support for plaintiffs' argument. As noted in *Haworth v. Lannon, 813 A.2d 62, 66 (R.I. 2003)* in order to establish a "special duty," the plaintiffs must demonstrate "specific knowledge of a particular plaintiff." *Haworth, 813 A.2d at 65.* This requires the plaintiffs to demonstrate that the plaintiffs had specific contact with the Town defendants such that the Town defendants "should have foreseen injury to them *in particular*." *Id. (emphasis added).* *See also Torres v. Damicis, 853 A.2d 1233, 1240 (R.I. 2004)("[t]here cannot be any special duty owed to [plaintiff] predicated on the special duty exception when the municipal official had neither contact nor specific knowledge of the injured individual").* The contact alleged by plaintiffs in the instant case involved contact with the owners of the nightclub not the individual patrons. Moreover, the alleged one time contact with defendant Bettencourt (assuming such direct contact occurred with

each of the 200 plus plaintiffs) on the night of the fire is insufficient to establish the special relationship needed to create a special duty. *Barratt v. Burlingham, 492 A.2d 1219, 1222 (R.I., 1985) ("A police officer's observation of a citizen's conduct that might foreseeable create a risk of harm to others, or the officer's temporary detention of the citizen is not sufficient in itself to create a "special relationship" that imposes on the officer such a special duty").*

Thus, even when the Amended Complaint is read in the light most favorable to plaintiffs, there is no support for the conclusion that defendants had either direct contact or specific knowledge of these individual plaintiffs. The public duty doctrine thus protects the defendants from the instant action and Plaintiffs' Amended Master Complaint must be dismissed.

4. *The R.I. Supreme Court has not barred Motions to Dismiss based on Public Duty*

As a last gasp, plaintiffs rely upon the Supreme Court's pronouncement that it is "virtually impossible" for a municipality to succeed on a motion to dismiss based on the public duty doctrine. *Plaintiffs' Memorandum, at 24 citing Haley v. Town of Lincoln, 611 A.2d 845, 849-50.* First, it is noteworthy, that the Court's explanation for this observation was the fact that under Rule 8's notice pleadings "a plaintiff is not obligated to provide in the complaint details concerning the state's awareness of or reaction to the circumstances surrounding his claim." *Id.* Thus, any gaps in the pleading had to be taken in the light most favorable to plaintiff such to defeat a claim for dismissal under the public duty doctrine. In this case, plaintiffs have filed a detailed, 145 page Amended Master Complaint that specifically identifies the alleged negligent acts by these defendants. *See Amended Master Complaint, at 93-96.* The R.I. Supreme Court's rationale for cautioning against motions to dismiss based on the public duty doctrine thus is not applicable to the instant case.

In addition, there is no dispute that the R.I. Supreme Court has not completely barred all motions to dismiss based upon the public duty doctrine. Rather, the Court noted that it was

"virtually impossible" – it did not say it was "impossible." The Court thus clearly left open the door for circumstances such as the instant case were the issue can be decided as a matter of law. These defendants invite the Court to accept all factual pleadings in the Complaint in the light most favorable to the plaintiffs. Defendants submit that even when it does, the Court can only conclude that these defendants are entitled to dismissal of the instant action.

D. Plaintiffs' Complaint fails to state a cause of action against the Town Defendants

Defendants have also moved to dismiss the instant complaint based on the position that there is no cause of action under the Fire Safety Code, *R.I.G.L. § 23-28.2-1 et seq.* Stated succinctly, there is no tort liability for a municipality's alleged failure to ensure that third parties obey the Fire Safety Code. In opposition, plaintiffs first rely upon cases that have found liability for negligent inspections by building officials for compliance with the Building Code. Noticeably, plaintiffs do not cite a case involving an inspection pursuant to the Fire Safety Code, *R.I.G.L. § 23-28.2-1 et seq.* This omission is fatal in that it demonstrates that R.I. SupremeCourt has not recognized a cause of action against deputy fire marshals for the alleged failure to ensure that third parties comply with the Fire Safety Code.

Plaintiffs nevertheless attempt to analogize the claim against the deputy fire marshal to claims made against building officials for the negligent inspection of buildings for compliance with the State Building Code. This analogy fails upon recognition of the fact that the Fire Safety Code imposes an affirmative duty on the owner/manager of an establishment to vigilantly monitor their establishment for compliance with the Code. *See i.e. R.I.G.L. § 23-28.6-2.* Under the Building Code meanwhile, the owner of a building typically relies upon a contractor or builder to construct a building in accordance with the Code. Typically an owner is only made aware of building code violations upon inspection. Plaintiffs' reliance on the building official inspection cases is therefore misplaced.

Plaintiffs alternatively argue that the Amended Complaint has stated a cause of action because they are seeking to maintain a claim based upon the alleged common law duty to "act carefully *after* affirmative conduct." Defendants submit that this position essentially acts as an end-run-around the obvious intent of the General Assembly *not* to permit such causes of action sounding in negligence based upon alleged failure to enforce the Fire Safety Code. As the Supreme Court noted in *Bandoni v. State of Rhode Island, 715 A.2d 580 (R.I. 1998),* the creation of new causes of action is a legislative function. To state that such a cause of action can be created when the official attempts to comply with their statutory obligations but not when the official utterly fails to take any steps to fulfill his/her duties, simply makes no sense. Rather, it is a veiled attempt to create a cause of action in an area that the General Assembly has declined to create.

Plaintiffs' reliance is further misplaced by the fact that at common law there was no cause of action against the municipality for failing to enforce regulatory provisions. As noted in the State's Reply Memorandum, "[t]here is neither a citation nor an argument that supports plaintiffs' claims that at common law the State had any obligation – let alone a legal "duty" – to inspect third party's premises and any such allegation is simply a request that this Court create a new Tort, which is an improper role for the Judiciary." *State's Reply Memorandum, at 8 citing Accent Store Design v. Marathon House, 674 A.2d 1223, 1225-1226 (R.I. 1996).* Defendants thus respectfully submit that plaintiffs' Amended Master Complaint fails to state a cause of action as a matter of law and accordingly the instant Complaint should be dismissed.

E. Plaintiffs' Injuries Were Caused by Illegal and Negligent Acts of Others for Which the Town Defendants Are Not Responsible.

In opposition to defendants' Motion to Dismiss based on the lack of proximate cause, plaintiffs first rely upon the argument that causation is a factual issue that is not properly determined on a Motion to Dismiss. However, while causation is "normally" a determination

left for a fact-finder, the Rhode Island Supreme Court "has not hesitated, in certain circumstances, to declare the absence of proximate cause as a matter of law." *Travelers Ins. Co. v. Priority Bus. Forms, 11 F. Supp. 2d 194, 200 (D.R.I., 1998).* Defendants submit that the facts alleged by plaintiffs in the instant case present just such a legal issue that is properly determined by this Court as a matter of law.

In particular, as more fully outlined in defendants' Memorandum in support of their Motion to Dismiss, the intervening criminal acts that occurred after the Town defendants' alleged negligence severed any already tentative causal link to plaintiffs' injuries and superceded any alleged negligence by the Town defendants. In opposition, plaintiffs claim that they have not alleged the fire was "intentionally ignited" and also that such activity was nevertheless "foreseeable." First, plaintiffs apparently attempt to distinguish this Court's *Travelers'* decision by the fact that *Travelers* involved the criminal act of arson. While plaintiffs do not allege the crime of "arson," the Amended Master Complaint clearly alleges that the *illegal* act of lighting pyrotechnics inside the Station nightclub led to plaintiffs' injuries. Such criminal activity, under well-settled case law, breaks any causal connection between the alleged negligent acts of these defendants and plaintiffs' injuries. Therefore, Plaintiffs' claim against the Town defendants must fail as a matter of law.

In any event, even if Plaintiffs' Amended Complaint did not allege an intentional criminal act, as this Court has noted, "[e]ven beyond intervening illegal acts of third persons, the Rhode Island Supreme Court has on several occasions found that certain intervening negligent acts of third persons are unforeseeable as a matter of law, and therefore, break the chain of proximate causation flowing from a defendant's original negligent acts." *Travelers, 11 F. Supp. 2d at 200 citing Walsh v. Israel Couture Post, No. 2274 V.F.W. of the United States, 542 A.2d 1094, 1097 (R.I. 1998) (where defendant negligently damaged railing on property of another,*

defendant was not bound to anticipate that property owner would allow nine days to pass without repairing railing, resulting in injury to plaintiff); Kemplin v. H.W. Godlen & Son, Inc., 52 R.I. 89, 157 A. 872, 872-73 (R.I. 1931) (where defendant employer ordered plaintiff employee to cross a street, defendant was not bound to anticipate that plaintiff would be struck by an automobile "being driven at an unsafe and unreasonable rate of speed").

The issue is whether the intervening act (either criminal or non-criminal) is foreseeable, which is determined by whether the act is the natural and probable consequence of the alleged negligence of the defendant. *Id. citing Clements v. Tashjoin, 92 R.I. 308, 168 A.2d 472, 475 (R.I. 1961 (Roberts, J., concurring) and Splendorio v. Bilray Demolition Co. Inc., 682 A.2d 461, 466 (R.I. 1996).* Defendants submit that the illegal lighting of pyrotechnics inside the nightclub by a third party is simply not the "natural and probable result" of failing to identify Fire Safety Code violations by the defendants. *Travelers, 11 F. Supp. 2d at 200.* Plaintiffs' Amended Complaint should accordingly be dismissed for failure to cite a causal relationship between the alleged negligent acts of defendants and plaintiffs' injuries.

F. The Complaint Fails to Support a Finding that the Town Defendants' actions were Criminal

Finally, in opposition to the Motion to Dismiss Count XXXIII[7] of their Amended Master Complaint, plaintiffs argue that the Complaint adequately alleges a claim under *R.I.G.L. § 9-1-2* because, pursuant to *R.I.G.L. § 11-1-1,* defendant Larocque has committed the "common law" crime of "criminal misfeasance and/or nonfeasance." *Plaintiffs' Reply Memorandum, at 31.* In support thereof, plaintiffs rely upon *R.I.G.L. § 11-1-1* for the position that any crime at common law shall remain a crime under Rhode Island law. However, plaintiffs do not cite support for the position the "misfeasance and/or nonfeasance" of an official was a recognized common law crime under Rhode Island jurisprudence. Rather, plaintiffs rely upon case law from other

[7] Count XXIX of Plaintiffs' original Complaint.

jurisdictions in support of the claim that such activities amount to a common law crime. Rhode Island, however, has never recognized such a criminal act. Absent such a criminal act under Rhode Island law, plaintiffs cannot pursue a claim under *§ 9-1-1.*

In addition, although plaintiffs correctly note that under *§ 9-1-2* the fact that a criminal complaint has not been brought does not negate the civil liability under the statute, the instant case is more than a situation where a criminal complaint has not been filed. Rather, the State Attorney General through the grand jury process, has specifically made the legal determination that the acts of defendant Larocque did *not* amount to a criminal act. Clearly, the limitation on *§ 9-1-2,* is not intended to circumvent the requirement that plaintiffs demonstrate an actual crime. Consequently, Count XXXIII of Plaintiffs' Complaint should be dismissed as a matter of law because plaintiffs have failed to allege a recognizable criminal act by these defendants.

III. CONCLUSION

For the reasons cited in its Memorandum of Law in support of its Motion to Dismiss and herein, as well as those that may be raised at hearing, the Town defendants respectfully requests that plaintiffs' Complaint be dismissed.

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CERTIFICATION OF SERVICE

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